Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NORTH AVENUE NOVELTIES, INC.,
an Illinois Corporation,

Petitioner,

VS.

CITY OF CHICAGO,
an Illinois Municipal Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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October 16, 1996

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QUESTIONS PRESENTED

Whether the Court of Appeals erred in concluding that Chicago's adult use zoning provisions are not unconstitutionally overrestrictive because it improperly assessed the impact of the existing, improperly located adult uses, which are not entitled to continue at their present locations as lawful prior nonconforming uses, and because it misapprehended the uncontradicted evidence concerning the number of actual sites available to adult uses?

PARTIES

The Plaintiffs in the District Court were North Avenue Novelties, Inc. and its President, Harold Gerstein. North Avenue Novelties, Inc. is incorporated under the laws of the State of Illinois and has its principal place of business at Chicago, Illinois. It has no parent or subsidiary corporations. The original Defendants were the City of Chicago and its Mayor, Richard M. Daley, sued in his official capacity only. The District Court dismissed Mayor Daley as a redundant defendant, and North Avenue Novelties, Inc. has not challenged and does not challenge that dismissal. Harold Gerstein no longer serves as North Avenue Novelties' President, and he did not pursue his appeal below. He is not a party here.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

North Avenue Novelties, Inc. respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 88 F.3d 441 (7th Cir. 1996) and is reprinted in the appendix to this Petition at page 3a.

The opinions and orders of the United States District Court for the Northern District of Illinois have not been reported but are reprinted in the appendix to this petition beginning at page 12a.

JURISDICTION

The District Court had federal question jurisdiction over North Avenue's claims pursuant to Sections 1331 and 1343(a)(3) of Title 28 of the United States Code because North Avenue challenged the validity of the City's adult use zoning provisions under the First Amendment to the United States Constitution as applied to the City by the Fourteenth Amendment thereto. *See infra* at 13a, 25a. The District Court also had supplemental jurisdiction over the City's counterclaims pursuant to Section 1367 of Title 28 of the United States Code because the City's counterclaims for relief under the challenged provisions were so related to North Avenue's challenges that they formed part of the same case or controversy within the meaning of Article III of the United States Constitution. *Id.* at 14a.

The District Court initially decided to enter a summary judgment in favor of the City, and such a judgment was entered on November 22, 1995. *See infra* at 25a. On November 29, 1995, however, North Avenue filed a motion under Rule 59 to set that judgment aside. The District Court granted that motion on January 19, 1995, and this case was reinstated. *Ibid.* The case was subsequently tried to the District Court during April, 1995. After taking the matter under advisement, the District Court entered its final judgment on June 19, 1995. *See infra* at 12a.

While North Avenue filed two motions to stay portions of the judgment pending appeal, and while the trial court

stayed enforcement of its final judgment until June 26, 1995 in order to permit North Avenue time to seek a stay from the Court of Appeals, North Avenue did not file any motion for a new trial or any other motion which would have effectively tolled the time within which to appeal. North Avenue and Harold Gerstein, the other plaintiff below, filed their notice of appeal with the Clerk of the District Court on June 20, 1995.

The Court of Appeals had jurisdiction over this appeal pursuant to Section 1291 of Title 28 of the United States Code because North Avenue sought review of a final decision and judgment of the United States District Court for the Northern District of Illinois which disposed of all of the claims and counterclaims with respect to all of the parties below. Harold Gerstein, who had been one of the plaintiffs before the District Court, abandoned his appeal while this matter was pending before the Court of Appeals, and that court dismissed his appeal prior to oral argument in that court. In due course, the Court of Appeals considered North Avenue's appeal, and it affirmed the District Court's judgment on July 1, 1996. *Infra* at 3a. On July 15, 1996, North Avenue filed a timely petition for rehearing, which the Court of Appeals finally denied on July 18, 1996. *See infra* at 1a.

This Court has jurisdiction to review the final judgment of the Court of Appeals under Section 1254(1) of Title 28 of the United States Code. North Avenue has neither sought nor obtained any extension of time in which to file this petition.

ORDINANCES INVOLVED

The adult use zoning provisions which North Avenue challenged below are codified in Sections 3.2, 9.3-2, and 9.3-3 of the Municipal Code of the City of Chicago. These provisions are reprinted in the appendix to this petition beginning at 32a.

STATEMENT OF THE CASE

Proceedings Below.

North Avenue Novelties, Inc. ("North Avenue") and its President, Harold Gerstein, filed this action in the United States District Court for the Northern District of Illinois on October 21, 1992 seeking declaratory and injunctive relief against the City of Chicago ("City") and its mayor[1] on the grounds that the so-called "adult use" zoning provisions promulgated by the City, *cf. infra* at 32a, were impermissibly overrestrictive in violation of the First and Fourteenth Amendments to the United States Constitution and Sections 2 and 4 of Article 1 of the Illinois Constitution of 1970. *See infra* at 17a. North Avenue presented its overrestrictiveness challenge as facial attack upon the City's adult use zoning provisions, asserting that the collective effect of the locational regulations which they imposed was to unreasonably interfere with the constitu-

[1]Mayor Richard M. Daley was sued in his official capacity only. On May 19, 1993, the District Court dismissed him as a redundant party defendant. North Avenue did not appeal from that dismissal and does not challenge it here.

tionally protected expression which adult uses disseminate. *Id.* at 6a, 18a.

On December 22, 1992, the City moved to dismiss North Avenue's complaint, arguing that North Avenue lacked standing to challenge the adult use zoning provisions because another City ordinance would prohibit North Avenue's operation at its chosen location even if the constitutional challenge were to succeed in invalidating the adult use zoning provisions. The City claimed that its Planned Manufacturing District ("PMD") ordinance prevented the operation of any bookstore on North Avenue's premises entirely independently of all of the zoning ordinance provisions which North Avenue challenged. *See infra* at 14a. Beyond this, the City also claimed that, as a matter of law, its adult use zoning provisions provided reasonable, content-neutral, time, place and manner restrictions which properly served a substantial governmental interest and which offered ample alternative avenues of communication. The District Court denied the City's motion in all substantive respects.

Thereafter, the City counterclaimed, assuming the validity of the challenged provisions and the independence of the PMD ordinance, seeking a permanent injunction restraining North Avenue from operating its adult bookstore at its chosen location and seeking retrospective sanctions for North Avenue's operation of that bookstore prior to and during the pendency of the litigation below. *Ibid.* The parties undertook discovery and the case proceeded towards trial, but on September 20, 1994, the City moved for summary judgment on North Avenue's complaint and counts I-IV of the City's counterclaim, principally raising claims identical to those which it had raised in its motion to dismiss. This time, however, the District Court determined that it did not have subject matter jurisdiction to

decide the claims asserted in North Avenue's complaint because North Avenue lacked standing after all. The court declined to consider North Avenue's overrestrictiveness challenge because it agreed with the City that the PMD provisions independently prohibited North Avenue's operation at its current location. *See infra* at 25a. Thus on November 14, 1994, the District Court entered an order granting the City's motion for summary judgment. Because of an unresolved issue concerning the appropriate amount of retrospective sanctions, however, the District Court did not enter judgment on that order until November 22, 1994. On November 29, 1994, North Avenue filed a timely motion for reconsideration, which the District Court granted on January 19, 1995, determining that certain factual issues surrounding the PMD ordinance required trial after all. *Ibid.*

The District Court thus reinstated this case, and conducted a three-day trial on the merits in April, 1995. It thereafter rejected North Avenue's overrestrictiveness challenge and upheld the constitutionality of the challenged provisions. *See infra* at 29a-31a. It held that the City's ordinances were not so overly restrictive as to violate the First Amendment to the United States Constitution, *Id.* at 30a, and it reinstated its earlier conclusion that North Avenue lacked standing because of independent prohibitions found in the PMD ordinance. *Id.* at 26a. On June 19, 1995, the trial court entered a permanent injunction restraining North Avenue from operating its bookstore at its location, *see infra* at 16a, and imposed certain retrospective sanctions, *Id.* at 12a. Also on June 19, the trial court denied North Avenue's requests for a further stay pending appeal under Rule 62(c) of the Federal Rules of Civil Procedure, but stayed its permanent injunction for a period of one week in order to permit North Avenue to seek temporary relief in the Court of Appeals. North Avenue filed its

Notice of Appeal and Jurisdictional Statement in this matter on June 20, 1995.

On July 11, 1995, the Court of Appeals denied North Avenue's motion for a stay and injunction pending appeal. North Avenue subsequently applied to Circuit Justice Stevens for a stay of the trial court's injunction pending the proceedings on appeal, but Justice Stevens denied that application on July 19, 1996.

Factual Background.

Prior to and during the proceedings in the District Court, North Avenue owned and operated a bookstore located at 1308 West North Avenue in Chicago from which it disseminated to adult members of the public who agreed to view or receive it sexually explicit but nonobscene expression in the form of books, magazines, motion pictures, and videotapes. Because of the character and amount of sexually oriented expression which North Avenue disseminated, its bookstore qualified as an "adult use," within the meaning of Section 17-3.2 of the Chicago Municipal Code, *cf.* infra at 32a. For this reason, the challenged provisions restricted North Avenue's bookstore to zoning districts designated C2 and C3 by the Chicago Zoning Ordinance and its associated zoning maps. They further required that, even within such zoning districts, North Avenue could locate only on lots which were, as measured between property lines, more than 1000 feet from (a) any other existing adult use, (b) and zoning district zoned for residential use, and (c) any pre-existing "school or place of worship." Depending upon just how the terms "school" and "place of worship" were defined, the challenged provisions left between 273 and 549 acres of land -- far less than one percent of the City's overall area -- available for adult uses. *See infra* at 21a-22a. The requirement that adult uses separate from one another by

at least 1000 feet imposed a "theoretical upper limit" of between 22 and 56 on the number of adult uses which could simultaneously locate within these available areas, *Id.* at 21a, and at the time North Avenue established its operation, "the City's zoning ordinance did provide for an unknown number of sites, described as 'numerous,' which were available to locate an adult use." *Id.* at 24a.[2]

Shortly after North Avenue opened its bookstore, two other adult uses had located on lots which complied with the challenged provisions, *see infra* at 24a, and the record discloses no instance in which a person who was seeking to locate an adult use was actually unable to find a legal location during the period at issue here, *Id.* at 10a. Nevertheless, North Avenue did not locate its bookstore within a C2 or C3 zoning district, *Id.* at 4a-5a, and although it was more than 1000 feet from the nearest school, place or worship, or other adult use, North Avenue admitted that it was located approximately 825 feet from the nearest zoning district zoned for residential use. *Ibid.* All of the land in that residential zoning district which was within 1000 feet of the bookstore, however, was occupied by the John F. Kennedy Expressway and all of the land in that zoning district which was actually in residential use was located across the expressway and more than 1000 feet from the bookstore. Because North Avenue believed that the challenged provisions were unconstitutional and void, it had deliberately chosen to locate its bookstore without regard to them, in

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[2]At the same time, 35 stores which obviously qualified as adult uses and more than 50 video stores which might so qualify, depending upon how the definition of "adult bookstore" was read, *cf. infra* at 32a ("separate section or segment devoted to the sale or display of [adult] material")), were located in the City outside of the required C2 and C3 zones. *Infra* at 22a.

the process bypassing numerous sites in C2 and C3 zones which appeared to be available for adult uses. *Id.* at 23a.

North Avenue's bookstore is, in fact, located in subdistrict 2 of Planned Manufacturing District No. 2, which is known as the "Elston Corridor PMD." *Id.* at 19a-20a. The City establishes PMDs in order to preserve its prime industrial areas so that Chicago may compete for manufacturing uses with the industrial parks of suburbia. *Id.* at 19a. The ordinances governing the PMDs generally provide for certain industrial uses and certain specified non-industrial and commercial uses felt to be accessory to industrial uses. *Ibid.* Despite its presence within the Elston Corridor PMD, however, subdistrict 2 is governed by the zoning regulations which apply to an ordinary M1-3 Restricted Manufacturing District. *Id.* at 20a. While this does not permit a bookstore, a variety store, or an indoor amusement establishment to locate in subdistrict 2, *infra* at 24a. it does permit 22 uses, many of which are distinctly commercial in nature, *see infra* at 20a (banks, barber shops, currency exchanges, drug and food stores, recreation buildings, private clubs, liquor stores, taverns, and offices)), though of light intensity, non-obstructive, and service or convenience-oriented, *Id.* at 19a-20a.

Under the foregoing circumstances, the trial court determined that the City's adult use zoning provisions provide sufficient sites for adult uses within the City to withstand constitutional challenge and that, even if they do not, the applicable PMD ordinance would nevertheless prohibit North Avenue's operation of its bookstore. *Id.* at 25a-31a.

The Court of Appeals reversed the District Court's determination that the PMD ordinance imposed an independent prohibition upon North Avenue which deprived it of standing to challenge the adult use zoning provisions.

The court recognized that, although North Avenue did not challenge the municipal interests underlying the PMD ordinance, it challenged that ordinance insofar as it contributed to the locational limitations which the City imposed upon adult uses.

> [North Avenue] challenges Chicago's overall scheme of limiting adult uses to certain specified areas. In essence, this is a facial attack on the ordinance because [North Avenue] alleges that it unconstitutionally limits the total amount of sexually explicit speech. In making this challenge, [North Avenue] necessarily contends that the PMD provisions contribute to the overall speech restriction.

Infra at 6a-7a. The Court of Appeals nevertheless affirmed the District Court's judgment because it concluded that the challenged provisions provide adult uses with a "reasonable opportunity" to open and operate in Chicago. It took as "relevant evidence" supporting this conclusion the facts that there are currently 35 adult uses operating in Chicago and that North Avenue's expert witness testified, as the court understood him, that "between 22 and 56 locations (depending upon precisely where adult uses would actually open) are available for new adult uses." *Id.* at 10a.

North Avenue petitioned the Court of Appeals for a rehearing on two narrow grounds. First North Avenue argued that the court had improperly ignored the legal ramifications of the record evidence that the existing uses do not, in fact, qualify as lawful preexisting nonconforming uses under the City's zoning ordinance. For this reason they can be required to move to the available lawful sites, and they thus cannot properly be counted in addition to those sites as the court suggested. In this sense, the existing adult uses weigh *against* the Court of Appeal's

conclusion that ample alternative sites are available in Chicago rather than for it. Second, North Avenue contended that the Court of Appeals misapprehended the testimony offered by North Avenue's expert witness at trial. North Avenue observed that while its witness testified that between 22 and 56 *geometric points* could be placed on a map in a way that satisfied the relevant locational requirements, he also testified that fewer than 22 *actual sites* could, in fact, be so placed. *See infra* at 40a, 51a. Since this number is less than the number of existing uses which can be compelled to relocate, North Avenue asserted that the record demonstrates that the challenged provisions are indeed overrestrictive. The Court of Appeals denied North Avenue's petition for rehearing on July 18, 1996. *Infra* at 2a.

REASONS FOR GRANTING THE WRIT

The Court of Appeals Erred in Concluding that Chicago's Adult Use Zoning Provisions Are Not Unconstitutionally Overrestrictive Because It Improperly Assessed the Impact of the Existing Adult Uses and Because It Misapprehended the Uncontradicted Evidence Concerning the Number of Actual Sites Available to Adult Uses.

In assessing North Avenue's overrestrictiveness challenge to the City's adult use zoning provisions, the Court of Appeals correctly characterized that challenge as a facial First Amendment challenge which legitimately reaches all of the City's zoning-related regulations insofar as they contribute to the locational restrictions which are imposed upon adult uses in Chicago. *See infra* at 6a-7a. It also correctly determined that the City bears the ultimate burden of justifying the challenged provisions under the

First Amendment, *Id.* at 7a,[3] by showing that they leave a sufficient number of sites open to adult uses "as a group" to insure that the "public as a whole" continues to have reasonable access to the presumptively protected expression which adult uses disseminate. *Id.* at 8a, citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62, 76 (1976).

The Court of Appeals seriously erred, however, in two narrow but critical respects. First, it improperly assessed the legal effect of the existing but improperly located adult uses in a context, presented here, where the City is not prepared to say that those existing uses are entitled to continue at their present locations as lawful prior nonconforming uses. Second, the Court of Appeals misapprehended the uncontradicted evidence concerning the number of actual sites which are simultaneously available to adult uses in Chicago under the challenged provisions. Since the number of such sites is *lower* than the number of presently existing adult uses which the City could require to relocate at any time, the proper legal effect of these existing adult uses is to establish that the challenged adult use zoning regulation are, in fact, unconstitutionally overrestrictive as North Avenue contends. North Avenue addresses each of these errors in turn.

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[3]*See also Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986), in which this Court expressly recited *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-54 (1986), as one of several examples of cases in which the government properly bears the burden of justifying restrictions on presumptively protected expression.

A. Since the 35 Adult Uses Existing in Chicago Are Unlawfully Located in the City's View, and Since the City Has Not Conceded Their Right to Operate, Their Presence Establishes on this Record the Minimum Level of Legally Unmet Demand for the Expression Disseminated by Adult Uses.

In concluding that the challenged adult use zoning provisions "provide[] sufficient alternate channels of communication for sexually explicit materials," the Court of Appeals expressly considered the fact, stipulated by the parties below, that "[t]here are currently 35 adult uses within Chicago's city limits." *See infra* at 10a. This fact would indeed go a long way toward helping the City to bear its burden of justifying the challenged adult use zoning provisions were it not for some additional related facts which the Court of Appeals left unmentioned and which it may have overlooked entirely.

The present record does *not* establish that the 35 adult uses which existed when North Avenue opened its store in 1992 are located on sites which are or were legally available to adult uses under any version of the City's adult use zoning provisions. The record reflects that these uses were established before the City had promulgated any adult use zoning provisions, and that they had, in fact, located on sites which became *un*available to adult uses under the challenged provisions. Thus it is not true that 35 adult uses have managed to find lawful sites under Chicago's adult use zoning regulations. Indeed, even the City has never argued that more than two of the currently existing adult uses managed to find proper sites under its ordinance provisions, and both of these opened after North Avenue began operating its store. *See infra* at 24a. At the time North Avenue opened its store, in fact, there were no lawfully located existing adult uses anywhere in Chicago;

and even by the time of the trial in this case all but two of the City's existing adult uses remained unlawfully located. *See Ibid.* (the two lawfully located existing adult uses were established in 1993). Thus all of the adult uses serving the demand for sexually explicit fare in Chicago in 1992 were, like North Avenue's store, illegally located in the City's view. This cannot show that the challenged adult use provisions provide for ample alternate channels of communication.[4] On the contrary, the fact that no existing adult uses were operating on lawful sites in 1992 strongly suggests just the opposite.

At one point, the District Court correctly noted that the challenged provisions do not require that the 35 preexisting adult uses shut down or move if they qualify as prior nonconforming uses. *See infra* at 22a. It could not properly suggest, however, that this observation supports the challenged ordinance provisions on this record because the parties expressly stipulated below that the City is unable to say that any of the 35 improperly located existing adult uses were ever operating as lawful prior nonconforming uses. (R. 135-7 at 346). Thus for all this record shows, the City could begin an enforcement campaign to close all 35 of them down the day after the final mandate issues in this case. This is precisely why *Morscott, Inc. v. City of Cleveland*, 781 F. Supp. 500, 505-506 (N.D. Ohio 1990), properly held that a municipality may not rely upon the presence of existing adult uses in defending against an overrestrictiveness challenge unless it establishes that there are existing adult uses which are *legally entitled* to continue operating as lawful prior nonconforming uses. This inherently plausible holding makes especially strong sense in light of

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[4]The City can hardly justify an artificially low limit on lawful adult use sites on the grounds that sexually explicit fare is, in fact, available at unlawful locations.

this Court's admonition that, where the regulation of presumptively protected expression is concerned, the courts may not rely upon statements or assumptions about municipal good faith to rescue otherwise unconstitutional ordinances. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 (1988). Yet that is all the City could offer here in the absence of any showing that the 35 existing adult uses are for some reason legally entitled to continue their operation. The City had every opportunity to make such a showing below, but it repeatedly refused to do so.

In light of these additional record facts, the existence of the 35 adult uses to which the Court of Appeals referred, *infra* at 10a, does bear upon the Court of Appeal's ultimate conclusion in this matter at least as strongly as the court's opinion suggests, but in exactly the opposite direction. Since the City has never even suggested that it will not move against the 35 improperly located adult uses -- and since nothing but its good faith would support any such suggestion even if it were made -- none of these uses can count in favor of available alternate channels under the challenged ordinance provisions. *Cf. Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). On the contrary, since each of these existing uses is currently serving a real demand for the expression disseminated by adult uses, they in fact count *against* the validity of the challenged ordinance in the same way that the existing nonconforming adult uses properly cut against the validity of the Los Angeles adult use zoning ordinance. See *Topanga Press, Inc v. City of Los Angeles*, 989 F.2d 1524, 1533 (9th Cir. 1993). Since the City might require that 35 of the existing uses relocate at its whim, it must show that at least 35 relocation sites are available for them in order to justify its regulation. Even apart from an express "reloca-

tion" analysis, the presence of 35 unlawfully located adult uses at the very least establishes the absolute minimum level of legally unmet demand in Chicago for the expression disseminated by adult uses. Indeed, the actual demand is very likely to be substantially higher than that since the fact that all of the adult uses existing in 1992 had been operating for years without any legal assurance that they could continue to do so has undoubtedly had a substantial chilling effect upon the willingness of other adult uses to open and operate under similar conditions.[5]

B. Professor Thomas Testified Without Contradiction that Less than 22 Actual Sites Would be Simultaneously Available in Chicago Using Even the Narrowest Definitions of "School" and "Place" of Worship." This Number Is Too Low Even to Serve the Minimum Legally Unmet Demand Established by this Record.

Given the establishment on this record of the foregoing minimum level of demand, the Court of Appeals misunderstood the ultimate thrust of North Avenue's factual argument when it remarked that "Novelties' entire argument

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[5]The same "chilling effect" consideration also reverses the thrust of the fact, noted by the Court of Appeals, *infra* at 10a, that the City's zoning administrator receives only 4 or 5 inquiries per year concerning prospective adult uses. Since the City points to only two uses which ever managed to find lawful sites under any version of its adult use zoning provisions (and even those were established after North Avenue opened its store), the low number of such inquiries may well amount to but another reflection of North Avenue's very point: the challenged provisions make so few locations lawfully available to adult uses that few are willing to bother even attempting to open to serve the existing demand.

rests upon comparing Thomas' figures with the figures relating to the ordinances at issue in other adult use zoning cases." *See infra* at 9a. North Avenue offered those comparisons to show just how poorly the City had provided for adult uses compared with other municipalities. The ultimate thrust of North Avenue's factual argument, however, was and is that the City has simply not provided enough simultaneously available locations to meet the local demand established by the record.

As noted at 12-16, *supra*, the absolute minimum legally unmet demand is established by the number of existing unlawfully located adult uses. The other side of the relevant comparison involves the number of available sites under the challenged provisions. Here too, North Avenue submits that the Court of Appeals misapprehended important facts of record. In the first place, the parties' experts did not substantially disagree over the amount of land which is available in Chicago based upon the City's narrow definition "school" and "place of worship." *Cf. Infra* at 9a. Under that narrowest definition, Thomas found 548.8 acres available and Smith found 532 acres available to adult uses. *Infra* at 20a-22a. Smith's raw figure is actually slightly lower than Thomas' because Smith, one of the City's planning officials, had some unpublished information available to him which Thomas did not use. *Id.* at 22a. Both Thomas and Smith thus arrived at a figure which constitutes well under four-tenths of one percent of the City's total area. To be sure, Smith made his percentage figures appear higher than Thomas' by dividing the area available to adult uses by less than the total land area of the City.[6] On cross examination, however, Smith readily

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[6]Smith calculated his one percent figure by excluding all park, residential, and transportation land from his comparison figure. He reached his three percent figure by excluding from the

admitted doing so, and he gave his reasons for using his chosen denominators. He admitted, however, as North Avenue has previously warned, that his percentage figures could not be compared with Thomas' percentages or with those reported in such cases as *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Thomas' .375 of one percent figure -- and the very similar percentage figure readily calculated from Smith's 532 acre finding and the total area of the City of Chicago -- *can* be so compared. Thus Smith's one to three percent figures, referenced by the Court of Appeals, *infra* at 9a, differed from Thomas' .375 of one percent figure not because of a difference in the actual area found available to adult uses but because of differences in the denominators each chose to use. See note 6, *supra*. Only Thomas compared his figures to the total municipal land area as had the *Renton* Court in reciting the five percent figure shown by the record in that case.

Thus, despite a possible contrary implication in the Court of Appeal's opinion, *infra* at 9a, both Thomas and Smith evaluated the land area available to adult uses under the narrowest definition of "school" and "place of worship," and each came to raw numbers which were very similar to one another.[7] In two important respects, however, Thomas'

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comparison figure all of the City's land except that identified as "commercial and service property": shopping malls, commercial and retail areas, business parks, office buildings, mixed use areas, cultural and entertainment uses, hotels and motels, and strip malls.

[7]During the trial below, the City admitted to the existence of one more place of worship than it had contended for when the pretrial stipulations were completed, and Smith was able to conclude that as a result of that additional place of worship, his raw 532 acre figure for available land would have to be reduced by 16 acres representing virtually all of the land which he had be-

analysis went much further than Smith's. First, Thomas analyzed the land area available to adult uses using not one but three lists of "schools" and "places of worship." Thomas' list 1 was identical to the list used by Smith, and it represented the list upon which the parties were able to agree prior to trial. *See infra* 39a-51a. Thomas' list 2 was identical to list 1 except that it included the I Am Reading Room/Temple, which, during the trial below, the parties eventually stipulated is a church, *infra* at 21a n. 2. Only Thomas' list 3 contained substantially more "schools" and "places of worship" than the City admits qualify under those ordinance terms. In large part but not entirely, the additional "schools" were postsecondary institutions and the additional "places of worship" involved religiously-oriented operations which the City characterized as drug and alcohol rehabilitation missions. *Id.* at 21a. The Court of Appeals correctly noted that, using list 3, Thomas concluded that only 273.3 acres, representing less than two-tenths of one percent of the City's total land area, were available for adult uses. *Infra* at 9a. Thomas did not, however, rely exclusively upon this lower value in carrying out his geometrical packing analysis.

Thomas' packing analysis represents the second important way in which his analysis went beyond Smith's. On this matter too, North Avenue respectfully submits that the Court of Appeals misapprehended Thomas' relevant testimony in two critical respects. That court properly noted that Thomas undertook a "packing analysis" in order to determine an upper limit on the number of adult uses which could locate in Chicago consistently with the requirement that they separate from one another by at least 1000 feet. *Infra* at 8a-9a. It also properly understood that since the theoretical maximum depends upon just how the adult

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lieved available to adult uses in the Loop.

uses -- or the geometrical points which Thomas used to represent them on a map -- fill in the available areas, Thomas necessarily reported ranges of maximum values. *Ibid.* Thomas reported such ranges for the areas which resulted from using each of the three lists described in the previous paragraph. See infra 39a-51a. The range of 22 to 56 possible points, cited by this Court, was derived using the 548.8 acres resulting from the narrowest definition of "school" and "place of worship," not from Thomas' lower 273.3 acre figure which this Court recited. *Id.* at 45a.

Even beyond this, it is critically important to recognize exactly what the cited range represents. Thomas carefully noted on direct examination that he had derived this range from a geometrical analysis which treated each adult use as a geometric point and which treated as appropriate any location within a map area available to adult uses. *Infra* at 39a-51a. He expressly testified that this analysis made at least two simplifying assumptions. First, it ignored the non-zero length and width of the actual physical lots occupied by residential uses, places of worship, schools, and hypothetical adult uses -- effectively measuring the required 1000-foot separations from the centers of the hypothetical lots rather than from actual lot lines as expressly required by the challenged ordinance provisions. *Ibid.* Second, it ignored the need under the Chicago zoning ordinance for street access for each use -- permitting location of a hypothetical adult use on a partial lot or in the middle of an existing street. *Ibid.* In evaluating Thomas' point-packing results, this Court[8] must take these simplifying assumptions

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[8]Heightened appellate factual review is appropriate in this case, since the challenged ordinance provisions regulate expression in a manner which gives rise to fact-sensitive questions. *See Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984).

into account. Thomas testified to the enormous difficulty in performing a packing analysis on actual lots rather than upon geometric points, but he was certain and unequivocal about the result of such analyses: the number of actual lots is lower even than the lowest number of packed points! Id. at 40a, 51a. Referring to the number 22 appearing at the bottom right-hand corner of the first page of Plaintiff's Exhibit 4, Professor Thomas testified as follows:

> Q. Now again, even this Count 4 number, is that the number -- sticking within the realm of theoretical points -- is that the number you would expect to be the lowest of all the counts?
>
> A. Within the theoretical concepts, yes.
>
> Q Now even this number, how might that relate to actual adult uses on actual land?
>
> A. It's got to be high.

Infra at 51a. Thus Thomas testified without contradiction that even the low end of the theoretical range recited by the courts below was higher than the number of actual adult uses which could simultaneously locate in Chicago. Even using the narrowest definition of "school" and "place of worship," Thomas found that, while perhaps as many as 56 geometric points could be packed onto the 548.8 available acres, less than 22 actual lots were simultaneously available to adult uses on that same area.

Since the City offered nothing to contradict Thomas' repeated and unequivocal testimony on this point, and since the trial court expressed no reason to doubt it, the present record thus establishes that less than 22 adult use sites are simultaneously available for location by adult uses in

Chicago.[9] On this record, then, North Avenue's factual argument is simply that the 22 actual lots which, under the most optimistic conditions, would be available for adult uses are too few to serve the legally unmet need in Chicago as minimally established by the 35 illegally zoned operating adult uses. North Avenue has no quarrel with the general law which the Court of Appeals articulated to govern challenges such as the one it brings here; but under that law, the present record demonstrates that the challenged adult use zoning provisions unconstitutionally failed to provide sufficient alternate channels for the presumptively protected expression which adult uses disseminate.

C. The Court of Appeal's Analysis of the Existing Adult Uses in this Case conflicts with that of Two Other Federal Courts of Appeals.

In its disposition of this case, the United States Court of Appeals for the Seventh Circuit departed from the analysis applied by the Fifth and the Ninth Circuits when assessing overrestrictiveness challenged to adult use zoning provisions. Both of those courts have plainly recognized that where there are existing improperly zoned adult uses which are not spared the need to relocate, the number of such uses serves to specify the minimum number of required sites. *Woodall v. City of El Paso*, 49 F.3d 1120 (5th Cir. 1995); *Topanga Press, Inc v. City of Los Angeles*, 989 F.2d

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[9]This record says nothing, of course, about how many actual lots are in fact available to adult uses on commercially reasonable terms. *Cf. Woodall v. City of El Paso*, 49 F.3d 1120 (5th Cir. 1995); *Topanga Press, Inc v. City of Los Angeles*, 989 F.2d 1524, 1533 (9th Cir. 1993). It says only that, assuming that enough such lots are available, there can never be more than 21 of them devoted to adult uses at any given time.

1524, 1533 (9th Cir. 1993). For this reason, issuance of the writ is particularly appropriate. Sup. Ct. R. 10(a).

CONCLUSION

For all of the foregoing reasons, this Court should direct a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in order to determine the proper effect on a facial First Amendment overrestrictiveness challenge of existing adult uses which are not properly located and which lack a clearly established legal right to continue to operate in their present location as prior nonconforming uses.

Respectfully submitted,

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

July 18, 1996

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

NORTH AVENUE NOVELTIES, INCORPORATED,	)	
Plaintiff-Appellant,	)	
vs.	)	No. 95-2474
CITY OF CHICAGO, an Illinois municipal corporation,	)	
Defendant-Appellee.	)	

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 92 C 7203

Harry D. Leinenweber, *Judge*.

ORDER

On consideration of the petition for rehearing filed by the plaintiff-appellant on July 15, 1996, all of the judges on the panel have voted to deny a rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

No. 95-2474

United States Court of Appeals

For the Seventh Circuit

NORTH AVENUE NOVELTIES, INC.

Plaintiff-Appellant,

vs.

CITY OF CHICAGO, an Illinois municipal corporation,

Defendant-Appellee.

Before CUMMINGS, BAUER and KANNE, Circuit Judges.

CUMMINGS, Circuit Judge.

Plaintiff North Avenue Novelties, Inc. ("Novelties") seeks a declaratory judgment that the provisions of the Chicago Zoning Ordinance specifying the location of "adult uses" in Chicago are unconstitutional. For the following reasons, we affirm the district court's conclusion that the ordinance is not unconstitutional.

I.

It is helpful to begin by examining the overall scheme of the Chicago Zoning Ordinance. Decades ago, the City of Chicago was divided into Residential Districts, Business Districts, Commercial Districts, and Manufacturing Districts. The ordinance was subsequently amended to

create a fifth type: Planned Manufacturing Districts ("PMDs"). Like any zoning scheme, the purpose of these divisions was to ensure conformity in the types of buildings and activities that comprise each area, and to achieve this result the Chicago Municipal Code outlines the specific "permitted uses" and "special uses" for each district. Any use that is not specifically listed is prohibited. See *Williams v. City of Bloomington*, 108 Ill. App. 2d 307, 311, 247 N.E.2d 446, 449 (4th Dist. 1969).

In 1992, the City of Chicago amended the Zoning Ordinance to limit the location of adult uses. It did so in two ways. First, it designated adult uses as special uses only for Commercial and Manufacturing Districts.[1] Second, it dictated that adult uses are only permitted if they are located at least 1,000 feet from (a) any existing adult use; (b) any existing school or place of worship; and (c) any district zoned for residential use. *Chicago, Ill. Municipal Code* §§ 17-9.32(B)(6) & 17-9.3-3(A)(4) (1992).

Novelties opened its bookstore in 1992 at 1308 W. North Avenue in Chicago. Given the sexual character of its products, the bookstore easily qualified as an "adult use" under the ordinance. However, the bookstore's location is such that it fails both adult use requirements. It is not within a Commercial or Manufacturing District, but is located in a PMD known as the "Elston Corridor PMD." And it is only 825 feet from a Residential District. Thus Novelties is precluded from operating the bookstore at its

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[1]Originally, adult uses were only "special uses" in General Commercial Districts (C2-1 to C2-5) and Commercial-Manufacturing Districts (C3-1 to C3-7). However, amendments in 1993 and 1994 expanded the area to encompass all Commercial Districts and Manufacturing Districts.

current location.

II.

As in any case, we must initially determine whether this dispute is properly before us. Although the district court concluded that the adult use provisions of the Chicago Zoning Ordinance were not unconstitutional, it initially held that Novelties lacked standing to assert its claim. This conclusion was based upon the fact that commercial and retail businesses adult or otherwise are not permitted to operate in PMD areas. See *Chicago, Ill. Municipal Code* §§ 17, Part F, ch. 10.3-1 (permitted uses) & 10.4-1 (special uses).[2] As a result, the court decided that a determination that the specific adult use provisions were unconstitutional would not change Novelties' position because the provisions prohibiting commercial operations in PMDs would still preclude the bookstore's operation.

We recently addressed a similar situation in *Harp Advertising Illinois v. Village of Chicago Ridge, Ill.*, 9 F.3d 1290 (7th Cir. 1993). In Harp, an advertising company wanted to erect a billboard in Chicago Ridge, Illinois, but the village's zoning code prohibited all off-premises signs. The company brought suit alleging that the zoning code violated the First Amendment. That code was not the only ordinance in play, however, for the village's sign code prohibited all signs with faces exceeding 200 square feet, which the plaintiff's sign did. Because the plaintiff did not

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[2]The regulations for the Elston Corridor PMD are the same as those governing an M1-3 Restricted Manufacturing District. However, despite this fact, adult uses are not permitted anywhere within the PMD because the amendment that allowed adult uses in MI-3 districts specifically stated that it did not apply to PMDs.

contest the validity of the sign ordinance, we held that it had no standing to challenge the zoning ordinance. We noted that one of the essential elements of standing is redressability: a favorable decision of the court must redress the plaintiff's injury. *Id.* at 1292 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-560, 112 S.Ct. 2130, 2135-36, 119 L.Ed.2d 351). Holding that the zoning ordinance was unconstitutional would not have changed the plaintiff's position because its sign would still have been precluded by another, valid, existing ordinance.

Harp is similar to our case in that another zoning provision also precludes adult book stores in Novelties' area: The ordinance prohibits all commercial activity, without regard to sexually explicit nature, in PMD areas. Thus the court below was correct that if one were to simply delete the adult use provisions from the ordinance, the PMD provisions would still remain to preclude Novelties' operation. However, the distinguishing factor between our case and *Harp* is that, unlike the plaintiff in *Harp*, Novelties challenges the PMD provisions of the ordinance as well as the adult use provisions, although admittedly it didn't spell this out in its complaint as clearly as it could have.

Novelties concedes that the City of Chicago is lawfully permitted under its police power to prohibit commercial and retail operations in areas, like the area here, that have been designated only for manufacturing and industrial business. See *Cosmopolitan Nat'l Bank v. County of Cook*, 103 I11. 2d 302, 310, 82 Ill. Dec. 649, 653, 469 N.E.2d 183, 187 (1984). However, Novelties challenges Chicago's overall scheme of limiting adult uses to certain specified areas. In essence, this is a facial attack on the ordinance because Novelties alleges that it unconstitutionally limits the total amount of sexually explicit speech. In making this

challenge, Novelties necessarily contends that the PMD provisions contribute to the overall speech restriction. One must only set forth in a complaint a "short and plain statement of the claim" in federal court, Fed. R. Civ. P. 8(a)(2), and "unlike insurance contracts, complaints are construed favorably to their drafters." *Hrubec v. National R.R. Passenger Corp.*, 981 F.2d 962, 963 (7th Cir. 1992). It would make little sense to read Novelties' complaint so strictly that it had fully conceded that some provisions of Chicago's Zoning Ordinance could preclude its operation such that it had no case. We conclude that we have jurisdiction to resolve Novelties' claim.

III.

Many municipalities have attempted to lessen the "secondary effects" of adult establishments by controlling their locations. The Chicago Zoning Ordinance is typical in this regard: It does not prohibit sexually explicit expression, but merely requires that such expression take place only in specified areas, and only in a non-concentrated manner. Such restrictions are viewed as content-neutral "time, place, and manner regulations," and are constitutional so long as they are "designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication." *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50, 106 S.Ct. 925, 930, 89 L.Ed.2d 29. As with any restriction on speech, the government bears the burden of justifying the regulation. See, *e.g.*, *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 3034-35, 106 L.Ed.2d 388; *City of Watseka v. Illinois Pub. Action Council*, 796 F.2d 1547, 1552 (7th Cir. 1986), aff'd, 479 U.S. 1048, 107 S.Ct. 919, 93 L.Ed.2d 972.

Novelties does not disagree with the City of Chicago's

substantial interest in regulating the location of sexually explicit materials; it contends only that the ordinance fails to leave open sufficient alternate communication avenues. It recognizes that the Supreme Court has previously upheld very similar zoning schemes: One which dispersed adult uses by requiring that they be 1,000 feet from each other, see *Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310, and one that concentrated them by requiring that they be 1,000 feet from residential areas, schools, and places of worship, see *Renton*, *supra*. Novelties contends, however, that while both of these schemes may have been constitutional in their respective cities, the Chicago Zoning Ordinance violates the First Amendment by merging the strategies and applying them to Chicago. We agree that the holdings of *Young* and *Renton* cannot merely be "combined" to conclude that the Chicago zoning scheme is necessarily constitutional; instead the scheme, as it is applied to Chicago's geographic area, must be considered.

In *Young*, the plurality focused on the fact that the ordinance at issue did not "deny [distributors of sexually explicit materials] access to the market or [render] the viewing public . . . unable to satisfy its appetite for sexually explicit fare." *Young*, 427 U.S. at 62, 96 S.Ct. at 2448. Justice Powell agreed and stated that the "primary concern of the free speech guarantee is that there be full opportunity for expression in all its varied forms to convey a desired message [and] that there be full opportunity for everyone to receive the message." *Id.* at 76, 96 S.Ct. at 2455 (J. Powell, concurring). Thus in analyzing Chicago's scheme, it is necessary to focus both on the ability of producers as a group to provide sexually explicit expression, as well as on the ability of the public as a whole to receive it.

Both parties used experts to evaluate the available

locations for adult uses under the ordinance. Edwin Thomas, a professor of quantitative geography, testified for Novelties, and Thomas Smith, Director of Planning and Development, testified for Chicago. Using the most expansive definition of "school" and "place of worship" possible, Professor Thomas concluded that the zoning ordinance left available roughly 270 acres, in various locations, or less than one percent of the land within Chicago's city limits. Mr. Smith's calculations led to figures for land available for adult use ranging from one percent to three percent. Novelties' entire argument rests upon comparing Thomas' figures with the figures relating to the ordinances at issue in other adult use zoning cases. It notes that the Chicago figures represent smaller acreage than that in Renton, Washington: Chicago would have to set aside for adult uses 5 percent of its land to be equivalent based on total acreage, or make 16,602 acres available to be equivalent based on population. See *Renton, supra*. And to equal the percentages of available land in Los Angeles, Chicago would need to provide roughly 3,637 acres (compared by land) or 5,943 acres (compared by population) for adult uses. See *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993)(affirming grant of preliminary injunction against ordinance's application to adult uses). Because Chicago's ordinance sets aside a lesser amount of space for adult uses than other cities, argues Novelties, its scheme is unconstitutional.

The district court properly dismissed these comparisons by noting that the amount of acreage, standing alone, is largely irrelevant. The constitution does not mandate that any minimum percentage of land be made available for certain types of speech. What it does require is that zoning schemes that regulate the location of speech provide a "reasonable opportunity" to disseminate the speech at issue. *Renton*, 475 U.S. at 52, 106 S.Ct. at 931; *Young*, 427 U.S.

at 71, 96 S.Ct. at 2452-53. Requiring a "reasonable opportunity" in each region can, and most likely does, result in vastly different acreage percentages. But those differences in no way imply that the regions with lower percentages are acting unconstitutionally.

With reasonable opportunity as the proper focus, the relevant evidence was as follows: There are currently 35 adult uses within Chicago's city limits. Thomas testified that numerous adult use sites were available when Novelties opened for business. He further testified that between 22 and 56 locations (depending upon precisely where adult uses would actually open) are available for new adult uses. The Chicago Zoning Administrator testified that his office receives only about 4 or 5 inquiries per year concerning possible adult use locations. There was no evidence that any person has attempted to open an adult use, but was prevented from doing so by Chicago's ordinance. From this it is clear that the zoning scheme has not lessened the ability of producers of sexually explicit materials to find legal locations throughout Chicago to sell their product. Moreover, there is no indication that the Chicago population is having any difficulty receiving this product. Therefore, the Chicago Zoning Ordinance provides for sufficient alternate channels of communication for sexually explicit materials and is not unconstitutional.

IV.

For the foregoing reasons, the district court's judgment is affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NORTH AVENUE NOVELTIES, INC.; and HAROLD GERSTEIN,	)	
Plaintiffs-Appellants,	)	Case No. 92 C 7023
vs.	)	
CITY OF CHICAGO, an Illinois municipal corporation,	)	Judge Leinenweber
Defendant-Appellee.	)	

NOTICE OF APPEAL

Notice is hereby given that both Plaintiffs, North Avenue Novelties, Inc. and Harold Gerstein, hereby appeal to the United States Court of Appeals for the Seventh Circuit from a final judgment entered in this action on the 19th day of June, 1995. The Plaintiffs appeal from all aspects of that judgment.

Michael Null /s/
Attorney for Plaintiffs

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United States District Court

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

NORTH AVENUE NOVELTIES INC.,
and HAROLD GERSTEIN

-V-

CITY OF CHICAGO, ILLINOIS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 92 C 7023

Decision by Court. This action came to trial before the Court. The issues have been tried and decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is hereby entered in favor of the defendant counter-plaintiff City of Chicago and against the plaintiffs counter-defendants North Avenue Novelties, Inc. and Harold Gerstein in the amount of $210,250.00 plus costs of suit.

June 19, 1995

H. Stuart Cunningham
Clerk

Wanda Farber /s/
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NORTH AVENUE NOVELTIES, INC., and HAROLD GERSTEIN,	)	
	)	No. 92 C 7023
Plaintiffs and Counter-Defendants,	)	
	)	
v.	)	Judge
CITY OF CHICAGO,	)	Leinenweber
	)	
Defendant and Counter-Plaintiff.	)	

ORDER

This matter, having been tried before this Court, the parties having presented evidence at trial and submitting briefs and joint stipulations of fact, the Court being fully advised, and the Court having issued a comprehensive written ruling on May 5, 1995,

THE COURT HEREBY MAKES THE FOLLOWING FINDINGS:

1. Plaintiffs North Avenue Novelties and Harold Gerstein (collectively referred to as "Novelties") have filed a First Amended Complaint seeking declaratory and injunctive relief. In their complaint, Novelties challenges the constitutionality of the City of Chicago's ("City's") adult use provisions (codified in Chicago Municipal Code, §§ 16-16-050, 17-9.3-2, 17-9.3-3). Novelties contends that the adult use provisions in effect in 1992 violate the First and Fourteenth Amendments to the United States Constitution

because they fail to provide sufficient alternative avenues of communication.

2. The City denies the allegations in the complaint. Pursuant to this Court's supplemental jurisdiction under 28 U.S.C. § 1367, the City has filed a five-count amended counterclaim ("counterclaim"). Count I seeks declaratory and injunctive relief for Novelties' continuous violation of the amended adult use provisions, which are not challenged in this lawsuit. Count II seeks civil penalties for each day Novelties operated in violation of the amended adult use provisions. Count III seeks declaratory and injunctive relief for Novelties' violation of the Planned Manufacturing District ordinance ("PMD Ordinance"), and Count IV seeks civil penalties for each day that Novelties operated in violation of this ordinance. The last count seeks civil penalties for Novelties' display of an electric sign without the requisite permits and for operating without the requisite Public Place of Amusement License and general business license. Novelties has raised defenses to the City's counterclaim, including the defense that it is not bound by the PMD Ordinance because the zoning provisions of the Chicago Municipal Code do not provide for sufficient alternative avenues of communication for adult speech under the First and Fourteenth Amendments to the United States Constitution.

3. The City argued that Novelties lacked standing to challenge the City's former adult use ordinance because even a successful challenge would not redress Novelties' injury because they still would be in violation of the PMD Ordinance. The City also argued that Novelties' challenge is moot because the challenged provision is no longer law. Finally, the City argued that the challenged 1992 adult use provisions provide for sufficient alternative avenues of communication and met all constitutional requirements.

4. The Court's findings of fact and conclusions of law were entered on May 5, 1995 and are incorporated herein by reference.

5. The Court expressly finds that North Avenue Novelties is an adult bookstore as defined by Section 16-16-030 of the Chicago Municipal Code and that the plaintiffs and counterdefendants have operated this retail use in a Planned Manufacturing District since July 27, 1992.

6. The area within which Novelties operates their business is not, and was not in 1992, zoned for an adult use. Further, the area within which Novelties operate their business is not, and was not in 1992, an area in which any bookstore, variety store, or indoor amusement establishment -- adult or otherwise -- permitted to operate.

7. Based on the testimony, exhibits, and stipulations submitted by the parties, the Court finds by a preponderance of the evidence that in the spring and summer of 1992, the City's zoning ordinance did provide for an unknown number of sites, described as "numerous," which were available to locate an adult use.

8. The Court further finds by a preponderance of the evidence that in July of 1992, the City's Adult Use Ordinance in conjunction with the City's zoning ordinances presented plaintiffs and others with a reasonable opportunity to open and operate an adult bookstore in the City of Chicago.

9. The court further finds that if the City were to deny a property owner the right to locate a bookstore, video arcade, a novelty shop, or other general retail business in a PMD, such denial would not be capricious and arbitrary.

WHEREFORE, this Court orders:

A. Novelties, their general partners, limited partners, officers, directors, agents, servants, employees, attorneys and any other person acting on Novelties behalf are permanently enjoined from operating an adult bookstore or other adult use at their current location at 1308 West North Avenue in Chicago;

B. Novelties, their general partners, limited partners, officers, directors, agents, servants, employees, attorneys, and any other person acting on Novelties' behalf are permanently enjoined from operating any retail use at their current location in violation of the City's PMD Ordinance;

ENTERED: Harry D. Leinenweber /s/

DATED: June 19, 1995

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NORTH AVENUE NOVELTIES, INC., an Illinois corporation, and HAROLD GERSTEIN,	)	
Plaintiffs/Counter-Defendants,	)	CASE NO. 92 C 7023
v.	)	JUDGE LEINENWEBER
CITY OF CHICAGO, a municipal corporation,	)	
Defendant/Counter-Plaintiff.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Plaintiffs/Counter-Defendants, North Avenue Novelties, Inc. ("North Avenue") and Harold Gerstein ("Gerstein") (collectively "plaintiffs"), have brought this action seeking injunctive and declaratory relief against the City of Chicago ("City") from enforcing certain provisions of the City of Chicago Adult Use Ordinance, Code § 17-3.2, § 16-16-030 ("Adult Use Ordinance" or "Ordinance"). The City has counterclaimed seeking an injunction restraining plaintiffs from operating their business in violation of the ordinance, the City licensing laws, and the City zoning code. It also seeks assessment of penalties against plaintiffs for violating its zoning and licensing laws.

2. Plaintiffs are making a facial attack on the ordinance as being unduly restrictive in violation of the First Amendment of the Constitution of the United States. Plaintiffs have specifically stated that they are not making an "as applied" attack on the ordinance.

3. The parties stipulated that Gerstein and North Avenue operate an adult bookstore as defined in the Adult Use Ordinance and have been the consecutive owners of the store located at 1308 West North Avenue in Chicago Illinois. Sexually explicit books, magazines, videotapes, and novelties are offered for sale, rental and on premises viewing.[1]

4. North Avenue was incorporated on June 15, 1994. At the time it initially opened for business on July 27, 1992, and up to that date, North Avenue was apparently operated by Gerstein as a sole proprietorship.

5. The ordinance in effect at the time Gerstein opened his store in 1992 restricted the location of an adult bookstore, as defined in the ordinance, to real estate

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[1]Plaintiffs introduced exhibits 6 through 12 as evidence of the sort of sexually explicit materials they sell at North Avenue Novelties, in contrast to, for example, Playboy. (See plaintiffs' exhibit 5). A cursory glance reveals that these materials, using the test enunciated in the famous concurring opinion of Mr. Justice Stewart in *Jacobellis v. State of Ohio*, 84 S.Ct. 1676, 1683: ". . . I know it when I see it . . .," are hard-core pornography. Such materials are not protected by the First Amendment. *Roth v. U.S.*, 354 U.S. 476, 485 (1957). However, the City disclaims the nature of the materials sold by plaintiffs as a defense in this case. This concession makes an interesting paradox: plaintiffs seek to distinguish their operation from other newsstands and bookstores by the nature of the materials sold, *i.e.* pornography. The City, on the other hand, seeks to minimize the distinction.

classified under the Chicago Zoning Ordinance as C2-1 to C2-5, General Commercial Districts, and C3-1 to C3-7, Commercial Manufacturing Districts. The ordinance also prohibited the location of an adult bookstore or other adult use within 1000 feet, as measured between property lines, from an existing adult use, school, place of worship, or any property classified under the zoning ordinance for residential use.

6. The parties stipulated that the City's purpose in enacting the adult use zoning regulations was a desire to protect residents from adverse effects of adult uses, while providing those who desire to patronize such uses with a reasonable opportunity to do so. The conclusion as to the adverse effects of adult uses was based on negative experiences of the city of Chicago and other cities including Seattle, Washington, and Detroit, Michigan, showing that adult uses lead to increased criminal activity and degradation of the quality of the area in which they are located. The court finds therefore that the ordinance is aimed at the secondary effects of adult uses rather than the contents of the adult materials.

7. The Chicago of Chicago Zoning Ordinance provides for the creation of zoning districts called Planned Manufacturing Districts ("PMDs"). The purpose of designating land as a PMD is to preserve the City's premier industrial areas so as to enable Chicago to compete with the industrial parks of suburbia. The City targets PMDs for large expenditures from its capital budget to improve infrastructure. A further purpose of the PMD is to preserve land for industrial use by preventing conversion to inconsistent uses.

8. North Avenue is located in subdistrict 2 of PMD No. 2, known as the "Elston Corridor PMD".

9. The PMD ordinances provide for certain industrial uses and certain specified non-industrial and commercial uses felt to be accessory to industrial uses. In 1992, at the time Gerstein opened for business, the PMD specified 22 permitted uses. The non-industrial and commercial use regulations governing subdistrict 2 are the same as those allowed in an M1-3 Restricted Manufacturing District. Code, Title 17, at 194D-7 to 9. In 1992, neither a bookstore, a variety store, nor an indoor amusement establishment was specified as a permitted or supplemental use in either the PMD or a M1-3 Restricted Manufacturing District.

10. The Director of the Department of Planning and Development of the City of Chicago, Thomas P. Smith ("Smith"), testified that it is the duty of his office to interpret the zoning code. His office interprets the zoning code to intend that any use not listed as a permitted use to be a prohibited use. He explained that the non-industrial uses permitted in subdistrict 2 are of light intensity and non-obstructive and are service types for the convenience of industrial employees. From a planning point of view, the fewer the non-industrial uses the better because when commercial uses multiply there is increased pressure to convert an area from industrial to commercial.

11. Smith interpreted the word "schools" as used in the Adult Use Ordinance to include primary and secondary institutions and to exclude colleges, universities, and business schools. He interpreted the words "places of worship" as used in the Adult Use Ordinance to mean churches and to exclude chapels of social service institutions.

12. Plaintiff called Edwin Neal Thomas (Thomas), Professor of Urban Geography at the University of Illinois

at Chicago, as their expert witness. The parties stipulated that he is an expert in the subject of quantitative geography. Using computer techniques acceptable to the parties, he analyzed the Chicago zoning ordinance in effect in 1992 to ascertain the location and quantity of land available in the City of Chicago for adult use locations in 1992, and the theoretical number of adult uses that could be packed into these areas. He first determined the location and quantity of all land zoned C-2 and C-3. He then subtracted the land lying within 1000 feet of an existing school or house of worship. From the results, he prepared three tables: No. 1, to include the land available using the City's list of churches and schools, excluding colleges, universities, adult schools, and social service institutions; No. 2, to include the land available using the City's list of churches and schools, including the I.M. Temple Reading Room[2]; and No. 3, including plaintiffs' list of churches and schools, which included colleges, universities, adult schools, and social service institutions with chapels. Using table No. 1, 548.33526 acres available were shown to be available for adult uses, table No. 2, 533.14103 acres available, and No. 3, 273.27624 acres available. He also computed, using a geometric packing theory, a theoretical upper limit to the total capacity question. He concluded that between 22 and 56 sites would be available because of the 1000 foot requirement between adult uses.

13. The City called Smith as its expert. The parties stipulated he possessed appropriate expertise to estimate

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[2]It was stipulated during the course of the trial that The I.M. Temple Reading Room is a place of worship as defined in the Adult Use Ordinance. This has the effect of reducing the land available for adult uses by approximately 16 acres. Thus Thomas' Table No. 2 is the applicable table rather than Table 1.

the amount of land available in the City for adult uses and that he employed the same methodology as Thomas. He concluded that there was approximately 532 acres available for adult uses under the ordinances in effect in 1992. Smith's total differed slightly from the total shown on Thomas' list No. 1 because he excluded land occupied by highways and waterways and included certain lands that had been reclassified C-2 and C-3 by the City after the zoning map used by Thomas was published.

14. The parties stipulated that in July, 1992 there were 35 adult uses operating in the City. It was also stipulated that there were approximately 50 video stores operating in the City in zones other than C-2 and C-3 that had separate sections devoted to the sale or rental of adult videos. The Adult Use Ordinance defines an adult bookstore to include stores that have a "segment or section devoted to the sale or display of [adult] material." However Smith testified that the City does not and has never considered such video stores to be adult bookstores. In determining whether a use is adult, the city considers the following non-exclusive list of factors; the presence of video preview booths, the exclusion of minors, the percentage of adult sales as compared to non-adult sales, form of advertising, signage, displays, and whether the establishment considers itself an adult use. Moreover the presence of an adult use outside of a C-2 or C-3 zoning district would not necessarily mean the business was illegally located. To determine whether the use was legal a so-called nonconforming use a zoning administrative officer considers a variety of factors, including the date that the business began operation and whether it was a legal use under the zoning law applicable at that time.

15. The City's zoning process is simple: If a business can find a properly zoned location, and if the building codes

are complied with, the City will issue an occupancy permit. There is no discretion to deny it.

16. Gerstein hired an adult use consultant, Thomas Harris ("Harris"), in the spring of 1992, to conduct a search for a location for a proposed adult bookstore to be owned and operated by him. Harris is not an attorney and is not a zoning or marketing expert. He has acted as a consultant for 6 to 14 adult businesses of which Gerstein was the only one located within the City of Chicago. His search consisted of a tour of some of the major geographic areas available for adult uses. He admitted that he found numerous sites which appeared to be available for adult uses in the various C-2 and C-3 districts he toured. However, he made no inquiries of the owners of any of these sites as to their availability. He also made no inquiries of the City zoning officials with respect to the legality of any site. In spite of the apparent availability of properly zoned sites he, nevertheless, recommended to Gerstein that he locate his business at the North Avenue site even though he knew that the site was located in a PMD, which he knew did not permit adult uses. He testified that the North Avenue site was "perfect for an adult book store" except that it lacked sufficient off street parking.[3] When asked why he recommended the North Avenue site in spite of the zoning problems, he testified that Gerstein's attorney, Michael Null, who is representing Gerstein in this case, advised him that in his opinion the Adult Use Ordinance was probably unconstitutional and,

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[3]The factors important to the location of an adult bookstore are: not too close to other commercial uses, a commercially active area with good traffic flow, the size and layout of the building, and adequate parking, particularly behind the store.

therefore, he need not restrict his search to properly zoned sites.

17. In January, 1993, two adult uses opened for business in properly zoned sites: The Doll House, located near plaintiffs' bookstore at 1531 West Kingsbury, and Erotic Warehouse, located west of the loop at the intersection of Randolph and Elizabeth Streets. These operations were issued all occupancy permits and licenses necessary to open for business, and continue to operate at these locations to this day.

18. Based on the above testimony, exhibits, and stipulations, the court finds by a preponderance of the evidence that in the spring and summer of 1992, the City's zoning ordinance did provide for an unknown number of sites, described as "numerous" which were available to locate an adult use.

19. The court further finds by a preponderance of the evidence that in July of 1992, the City's Adult Use Ordinance in conjunction with the City's zoning ordinances presented plaintiffs and others with a reasonable opportunity to open and operate an adult bookstore in the City of Chicago.

20. The court further finds, considering the reasons Smith gave for severely limiting non-industrial uses in PMDs and the other evidence in the case, that if the City were to deny a property owner the right to locate a bookstore, a video arcade, a novelty shop, or other general retail business in a PMD, such denial would not be capricious and unreasonable.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the subject matter of this case pursuant to 28 U.S.C. § 1331, 1343(a),(3) and (4), and 1367(a). Venue is proper in this district under 28 U.S.C. § 1391(b).

2. The first issue the court must consider is whether plaintiff has standing to contest the validity of the Adult Use Ordinance. On November 14, 1994, the court granted the City's motion for summary judgment on the basis that plaintiffs had not established that they had standing to bring this suit. The court noted that the Constitution limited jurisdiction of federal courts to "cases and controversies." *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992); *Harp Advertising v. Village of Chicago Ridge*, 9 F.3d 1290, 1292 (1993). An "essential" part of the "case or controversy" requirement is standing. The irreducible constitutional minimum for standing consists of three elements. First, the plaintiff must have suffered an "injury in fact." Second, the injury has to be fairly traceable to the challenged action of the defendant. Third, it must be likely that the injury will be redressed by a favorable decision. *Id.* This court held at that time that while plaintiffs could establish the first two elements, they failed to establish the third. The court stated that even if it agreed with plaintiffs and found the Adult Use Ordinance unconstitutional, the provisions of the PMD would still not allow them to locate at the North Avenue address.

On January 19, 1995, the court reconsidered the summary judgment on the basis that there was a valid question whether an attempt to distinguish between defendant's use and other permitted and supplementary uses allowed in subdistrict 2 of the PMD No. 2 would be "capricious and unreasonable" under the equal protection

clause. See *Cohen v. City of Des Plaines*, 8 F.3d 484, 494-5 (7th Cir. 1993).

The evidence has proved that the purpose of the PMD is to promote industrial development and to allow only those commercial uses deemed to be accessory services to industrial employees. The planning principle involved is to avoid increasing commercial uses in a PMD so as not to create pressure to convert the area from industrial to commercial. It is clear that a city may use the zoning ordinance as an exercise of its police power. The City's decision to restrict commercial uses to those deemed accessory to and desirable in a PMD was rational. Even if it is considered "fairly debatable, the legislative judgment must be allowed to control." *Euclid v. Ambler Realty Co.*, 47 S.Ct. 114, 118 (1926) quoted in *Cohen*, 8 F.3d at 495. Since, based on the foregoing, the court has found that denial of the right to open a bookstore, arcade or novelty shop in a PMD would not be capricious and unreasonable, a decision of this court holding the Adult Use Ordinance unconstitutional would not redress plaintiffs' injury. Therefore, the court finds that plaintiffs lack standing to bring this suit.

3. Even if the court found that plaintiffs had standing to contest the Adult Use Ordinance, they would fail on the merits.

The Supreme Court first had occasion to apply the First Amendment to sex materials in *Roth v. U.S*, 77 S.Ct. 1304 (1957). The case established that sex and obscenity are not synonymous. The former is protected and the latter is unprotected by the First Amendment. Distinguishing between the two has been a thorny problem and has led to a number of tests and guidelines. *See, e.g., Miller v. California*, 93 S.Ct. 2607 (1973). Efforts to eradicate

obscene materials has been doomed to failure due to the stringency of the substantive and procedural hoops dictated by the First Amendment. As a consequence, some municipalities have sought to contain these materials rather than eradicate them. A popular way has been through application of zoning laws. *See, e.g., Young v. American Mini Theatres*, 96 S.Ct. 2440 (1976)(ordinance adopted requiring adult uses to be dispersed), and *Renton v. Playtime Theatres, Inc.*, 96 S.Ct. 2440 (1986)(ordinance adopted requiring adult uses to be concentrated). However, the Supreme Court in Renton cautioned against efforts to eradicate under the guise of zoning laws because to do so would be a clear violation of the First Amendment. However, if the ordinance was aimed at secondary effects of adult uses rather than the content of the materials, it will be classified as "content neutral" and thus the City will be spared the heavy burden of overcoming the presumption of First Amendment violation. Instead, the case will present the question whether "the ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." 106 S. Ct. at 930. In other words, a community must "refrain from effectively denying [plaintiff] a reasonable opportunity to open and operate an adult [bookstore] within the city . . .." 106 S. Ct at 932.

The City's purpose in enacting its adult use zoning regulations are certainly equal to the interest expressed by Detroit (*Young v. American Mini Theatres, Inc.*, 96 S. Ct. 2440, 2453 n. 34) and the City of Renton (*Renton* 106 S. Ct at 931), and are conceded by the plaintiffs as such. This leaves the question of whether the City legislative scheme has left "reasonable alternative avenues of communication" which appears to be another way of putting the question of whether this means adopted or narrowly tailored to serve

the governmental interest involved *Graff v. City of Chicago*, 9 F.3d 1309 1321 (7th Cir 1993).

The first issue to be addressed is who has the burden of proof on the issue of reasonable opportunity? The Fourth Circuit seems to indicate that the burden is on the plaintiff when it stated its analysis with a "strong presumption of constitutionality" because zoning and adult use ordinances are legislative acts. *11126 Baltimore Blvd. v. Prince George's County, Md.*, 886 F.2d 1415, 1421 (4th Cir. 1998). However, in the Seventh Circuit, the law may be otherwise. In *Graff*, the City of Chicago did not dispute plaintiff's assertion that burden of proof on the reasonableness of the ordinance's time, place and manner restrictions were on the City[4]. Apparently, based on this concession, the Seventh Circuit assumed that it was. 9 F.3d at 1322. However, the two cases relied upon by plaintiff in *Graff* (*City of Los Angeles v. Preferred*, 106 S.Ct. 2034, 2038 (1986), and *Speiser v. Randall*, 78 S.Ct. 1332 (1958)), do not say what he says they say. They appear to say that the government has the burden of proving whether an ordinance or statute regulating speech is content neutral. However, once this has been proved the burden would appear to shift to the contestant because the ordinance or statute would be presumed valid as an exercise of police power.

However, even assuming that the City has the burden of showing that adult use purveyors in 1992 had a reasonable opportunity to open for business in Chicago, based on the court's Findings of Fact above, it has done so.

The parties hotly disputed the definitions of "school" and "places of worship" because the parties agree, using the

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[4]As is obvious, the City does not make the same concession here.

City's restricted definitions, that the amount of land doubles. However, using plaintiffs' expansive definitions still leaves approximately 270 acres of City land in various locations available for adult uses. Smith and Harris testified that there were numerous sites available. The City produced evidence that within one year of plaintiffs' opening two adult uses legally in the City, one near plaintiffs'. Paul Woznicke, the City zoning administrator, testified that his office received only 4 to 5 inquiries a year concerning possible locations for adult uses. There was no evidence that any person was unable to find a legal location during this period. Harris testified that he made very little effort to locate a legal site, other than to make a sidewalk survey of the area which showed numerous available sites. He recommended the North Avenue location, knowing it was not properly zoned, on the basis of a legal opinion that the Adult Use Ordinance was probably unconstitutional rather than non-availability.

The amount of acreage, whether 270 acres or 540 acres, or .187 percent or .375 percent of the total area of the city, standing alone is largely irrelevant.[5] It must be compared to something, such as how much land is necessary to accommodate the demand for sites. The record is devoid of any marketing studies or other evidence pertaining to the demand for adult use sites in 1992 or pertaining to the demand for adult materials and the number of stores it would take to meet it. The constitution does not require that a city make an amount of land available for adult uses that is greater than the demand to provide a reasonable

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[5]So is the number of uses that could be packed into the available area, absent a showing that a reasonable amount of sites were not available considering the demand.

opportunity to open.[6] In fact, in *Renton*, the lower court found that "practically none" of the land supposedly made available by the Renton ordinance was appropriate for the location of an adult theater. The Supreme Court, nevertheless, was unsympathetic and told the prospective adult uses that they "must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees." 106 S.Ct. at 932. In contrast, the court here has specifically found that the City ordinances have made numerous sites available for adult uses. The court, therefore, finds that the City of Chicago Ordinance is not so restrictive as to violate the First Amendment of the Constitution of the United States.

4. The court finds the issues in favor of the City of Chicago and against the plaintiffs on plaintiffs' complaint. Judgment is entered in favor of the City and against plaintiffs.

COUNTERCLAIM

The court having found that plaintiffs/counter-defendants' operation of an adult use at 1308 West North Avenue is in violation of the Chicago of Chicago zoning ordinances, thus finds the issues in favor of the City and against plaintiffs. The City is entitled to an injunction to prevent violation of its zoning ordinance. 65 ILCS 5/11-13-15; *City of Chicago v. First Nat'l Bank of Skokie*, 682 N.E.2d 682 (lst Dist. 1972). The City is also entitled to

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[6]In fact the parties have stipulated that a year later, in 1993, the City amended its adult use ordinance to add more zoning districts for location of adult uses. In 1994, it did so again. This would lend credence to the City's position that it is not trying to squeeze adult uses out of existence.

penalties for operating in violation. The court will set hearing on the penalties at a later date.

IT IS SO ORDERED.

Harry D. Leinenweber, Judge
United States District Court

DATED: 5/5/95

Be It Ordained by the City Council of the City of Chicago:

SECTION 1. That Chapter 194A, the "Chicago Zoning Ordinance," of the Municipal Code of Chicago is hereby amended in Section 3.2 by adding a new definition in proper alphabetical sequence, and in Sections 9.3-2, 9.3-3 and 9.4-2 by deleting the language in brackets and adding the language in italics, as follows:

3.2

* * * * *

Adult Uses. The phrase "adult uses" means adult book stores, adult motion picture theaters, adult mini motion picture theaters, adult entertainment cabarets, as defined below, or similar establishments.

a. An adult book store is an establishment having as a substantial or significant portion of its stock and trade books, magazines, films for sale or viewing on premises by use of motion picture devices or any other coin-operated means, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities," or "specified anatomical areas," or an establishment with a segment or section devoted to the sale or display of such material.

b. An adult motion picture theater is an enclosed building with a capacity of 50 or more persons used regularly and routinely for presenting material having as a dominant theme material distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," for observation by patrons therein.

c. An adult mini motion picture theater is an enclosed building with a capacity for less than 50 persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," for observation by patrons therein.

d. An adult entertainment cabaret is a public or private establishment which, is licensed to serve food and/or alcoholic beverages, which features topless dancers, strippers, male or female impersonators, or similar entertainers.

e. The phrase "specified sexual activities" in connection with adult uses means:

1. Human genitals in a state of sexual stimulation or arousal;

2. Acts of human masturbation, sexual intercourse or sodomy;

3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

f. The phrase "specified anatomical areas in connection with adult uses means:

1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock and (c) female breast below a point immediately above the top of the areola; and

2. Human male genitals in a discernibly turgid state even if completely and opaquely covered.

* * * * *

9.3-2 Permitted Uses -- General Commercial Districts.

* * *

B. The following uses are permitted in the C2-1 to C2-5 Districts inclusive:

(1) Any use permitted in the Cl-l to Cl-5 Districts inclusive -- as set forth in Section 9.3-1B unless otherwise set forth or superseded hereinafter.

(2) Contractor's Yards.

(3) Gas Utility Service Substations

(4) Motor Vehicle Sales.

(5) Hotel and Motels.

(6) Adult Uses, provided that, as measured between property lines, no such Adult Use shall be located

a. Within 1,000 feet of another existing Adult Use; nor

b. Within l,000 feet of any Zoning District which is zoned for Residential Use; nor

c. Within 1,000 feet of any pre-existing school or place of worship.

* * * * *

9.3-3 Permitted Uses -- C3-1 to C3-7 Commercial-Manufacturing Districts.

* * *

B. The following uses are permitted in the C3-1 to C3-7 Districts inclusive:

(1) Any use permitted in the Cl-l to C1-5 Districts inclusive -- as set forth in Section 9.3-1B -- unless otherwise set forth or superseded hereinafter.

(2) Any Production, Processing, Cleaning, Servicing, Testing, or Repair of Materials, Goods, or Products, subject to the conditions imposed under 9.3-3A.

(3) Hotels and Motels.

(4) Adult Uses, provided that, as measured between property lines, no such Adult Use shall be located,

a. Within 1,000 feet of another existing Adult Use; nor

b. Within 1,000 feet of any Zoning District which is zoned for Residential Use; nor

c. Within 1,000 feet of any pre-existing school or place of worship.

* * * * *

9.4-2 Special Uses -- C2-1 to C2-5 General Commercial Districts.

[(1)] Any special use allowed in C1-1 [and] *through* C1-5 Districts, inclusive.

[(2) In C2-4 Districts, Adult uses, as defined in Chapter 194C of the Municipal Code of Chicago.]

SECTION 2. That Chapter 194C, Section 4 of the Municipal Code Of Chicago is hereby amended by renumbering all of its sections in accordance with the provisions of Chapter 1 of this Code and by deleting the language in brackets and adding the language in italics as follows:

[Section 1] 194C-1. * * *

[Section 2] 194C-2. * * *

[Section 3] 194C-3. * * *

[A] *a.* * * *

[B] *b.* * * *

[C] *c.* * * *

[D] *d.* * * *

[E] *e.* * * *

[F] *f.* * * *

[SECTION 4.] 194C-4. Regulated Uses. Regulated Uses include all Adult Uses which include, but are not limited to the following:

Adult Book Store.

Adult Motion Picture Theater.

Adult Mini Motion Picture Theater.

Adult Entertainment Cabaret.

[4.1] 194C-4.1. Adult Uses shall be permitted subject to [the following] *zoning* restrictions as provided in Chapter 194-A[:].

[(1) No such Adult Use shall be allowed within 1,000 feet of another existing Adult Use.

(2) No such Adult Use shall be located within 1,000 feet of any Zoning District which is zoned for Residential Use.

(3) No such Adult Use shall be located within 1,000 feet of a pre-existing school or place of worship.

(4) No such Adult Use shall be located in any Zoning District except a C-2 zoned area.]

[SECTION 5] 194C-5.

[(a)]. * * *

[(b)]. * * *

[(c)]. * * *

[(d)]. * * *

[(e)]. * * *

[(f)]. * * *

[(g)]. * * *

[(h)]. * * *

[(i)]. * * *

194C-5 * * *

194C-5.2 * * *

[SECTION 6] 194C-6. * * *

[6.1] * * *

[6.2] *194C-6.1.* * * *

[6.3] *194C-6.2.* * * *

[SECTION 7] 194C-7. * * *

[7.1] * * *

[7.2] 194C-7.1. * * *

SECTION 3. This ordinance shall take effect from and after its passage.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NORTH AVENUE NOVELTIES, INC., and HAROLD GERSTEIN,	)	
	)	Docket No.
Plaintiffs/ Counter-Defendants,	)	92 C 7023
	) Chicago, Illinois	
v.	) April 19, 1995	
	) 10:00 o'clock	
CITY OF CHICAGO, a municipal corporation,	) a.m.	
Defendant/ Counter-Plaintiff.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE HARRY D. LEINENWEBER

* * * * *

Edwin Thomas -- Direct Examination.

Q If we did that, if we accepted that method or that protocol with using Model 1, that is, sliding it around to get the absolute maximum number of points, what would that tell us?

A That would tell us, in a theoretical and abstract way, the largest number of adult uses that could be located within a particular zoning district and, if we did it for all

the zoning districts within the context of their locations, then it would ultimately allow us to sum up the largest number of theoretical adult uses.

Q If we did that and we got a sum of the largest number of theoretical adult uses, can you tell us how that could be expected to relate to the number of actual adult uses that could actually fit on actual land?

A It would be larger than --

Q Which would be larger?

A The theoretical number would be larger than the actual number.

Q Again, just for the record, could we specify some of the reasons why the prediction would be larger than reality?

A Yes.

Q What are those?

A First of all, the lot size of a particular adult use would extend in one direction or another the spacing so that the pattern would not be any more a perfect equilateral triangular lattice but some points would be further apart than others.

In addition to that, where we consider the second point, it's space-occupying, as well. We could boil this down to Point No. 1 being the actual space of the lot on which an adult use is located are not taken account of in the theoretical model. No. 2, I think that we have to show some cognizance of the street grid. So that certain adult uses

that are small residuals in the center of large areas that have, in fact, no road to them probably would not be legitimately considered an adult use in the practical sense of the word.

Q Even though in theory you could put a point there and count it?

A Yes.

Q When we think of this -- again, we are returning to the assumption that the adult use occupies a point and that there is a circle of one thousand-foot radius around. Is there any effect that the actual size of the lots that lie along the circumference of that circle would have on the analysis?

A Well, if any lot touched by the circle is in fact in the area that is prohibited from other adult uses, then that would enlarge the acreage to include that total area of the irregular shape made up of all those lots that were garnered by being touched by the radius.

Q In other words, if we return to the assumption that an adult use located in the middle of a very large regular area but take into account the actual lot lines, you are saying, I take it, that this thousand-foot circle would no longer be a circle but would be some irregular shape that would have additional area contributed by lots that were touched in part but not completely by the circumference of that original circle, is that what you are saying?

A That is correct.

THE COURT: Another example. Let's say you had a one thousand square foot parcel of land which was zoned

C2, not affected by a church or a school. Theoretically you could put four, I mean, at the four corners?

THE WITNESS: Yes.

THE COURT: But, if one is located in the middle, then you would only be able to put one?

THE WITNESS: No.

THE COURT: I am saying, an isolated parcel would have to be --

THE WITNESS: Sir, it is a matter of the shape of that parcel. If, it were a thousand feet on a side and if it were square, then we could take out that circle but then we could put, in fact, five there. Because there would be the little area of the corner that was not covered by that circle.

MR. LEE: So, you can see, your Honor, he is really packing them in.

THE WITNESS: It is tricky because shape is very, very important. If you think of length and think of something that, in theory, has no [width], then, if it is going to have a thousand feet, an area of a thousand feet, it could be very, very long and you could get an infinite number of points in it. So, shape is important. Location next to other things is important.

BY MR. LEE:

Q Professor Thomas, let me follow up on a question that his Honor asked. Let's return to this area that is a perfect square, one thousand feet on a side. Let's say it is situated out by Lake Calumet somewhere, and it happens

to be land that contains only three lots. They are situated such that all the lots are adjacent to each other. Then how many adult uses could you fit in that. area consistent with the dictates of the zoning ordinance that the thousand foot restriction is measured from property line to property line?

A If I envision the map of this correctly, just one.

Q So that lot lines, actual lot lines, might have a dramatically reducing effect. In this case it reduced from a theoretical maximum of five down to one, is that correct?

A Yes.

Q Now, when we talked about this Model l, -- this densest possible packing, is it realistic -- is it likely that actual adult uses would rigidly follow this equilateral triangular native as they fill in an area?

A In my experience in similar but not identical things that perfect equal lateral triangular lattice is just never encountered.

Q Again, departures from this Model 1, equilateral triangular lattice, would the effect on the number that could fit in a given area of departures from that always be in fact in one direction?

A Yes.

Q Which direction would that be?

A The actual number would always be le[ss] [than] the theoretical number as long as the fundamental spacing were the same.

Q Now, you said that you could take either Model 1 or Model 2, a lattice drawn on either the Model 1 or Model 2 analysis and slide it around on a map in order to get the most possible theoretical points in an area, is that correct?

A Yes.

Q What if you did it another way with either model? What if you slid it around in order to get the least number of points in an area that would still consistent with the lattice as it is structured? Is that another possible way of sliding the lattice around on the map?

A Sure.

Q If you did that, would there, under those circumstances, be room for any more adult uses?

A No.

Q Would the numbers that results from that kind of sliding mechanism be -- how would they relate to the numbers that would result from the first sliding protocol that you mentioned?

A Those numbers -- the second procedure would result in smaller numbers.

Q Now, would even those numbers suffer the results of the same simplifying assumption that you mentioned, that is, the lack of taking account finite lot size, the lack of street access and worrying about the actual street structure -- would the numbers, even those lower numbers, suffer from those same problems?

A Yes.

Q Would they likely, also, be high in terms of their relation to the actual adult uses that might locate on actual lands?

A They would be high.

Q Now, Professor Thomas, with respect to each of the lists that you have used, each of the lists that you have prepared and the maps that relate to the amount of land available on analyses of each of the lists, have you in fact made an assessment of how these various models and these various mechanisms, these various protocols for sliding the lattice around on the map -- have you made an assessment about the outcome, the theoretical outcome, of those counts?

A Yes.

Q Now, Professor Thomas, I would like to ask you about the numbers that resulted from the following case.

MR. SCHMETTERER: Your Honor, I am not sure if Professor Thomas is reviewing any documents following these questions. If he is, I would like to see what he is reviewing.

BY MR. LEE:

Q Professor Thomas, will you need to refer to any documents to refresh your recollection with respect to your results?

A To the results? Yes, I will.

Q Very well. I show you --

MR. LEE: May I have a moment, your Honor?

THE COURT: All right.

(Brief pause.)

BY MR. LEE:

Q I show you what I have marked for identification as Plaintiffs' Exhibit No. 4.

(Exhibit tendered to the witness.)

BY MR. LEE:

Q I ask whether you recognize that document?

A Yes,I do.

Q Who prepared it?

A I prepared it.

Q Again, like some of the others, is that in fact a group exhibit consisting of several pages?

A Yes, it is.

Q Could you describe to us what this document shows and how each of the pages differ?

A Each of the pages differ in that they pertain to the zoning districts that were available for adult uses on List 1, List 2 and List 3.

Q Now, that is the only difference between the pages?

A Correct.

Q Now, let's focus on the first page. Can you tell us what the first page says about List 1?

A On the first page four variables are shown. There is a name variable, a Count 1 variable, a Count 2 variable, a Count 3 variable and a Count 4 variable.

Q Let's start with the name variable. What does that represent?

A That is the name of the zoning district. The name is established by, first, whether the type of district was C2 or C3, and then after the first two characters, the next two or three characters specify a page in the zoning atlas where the zoning district was found, and then there is a suffix there that is Dot 1 or Dot 2 or whatever, and that suffix indicates that this was the first zoning district on the page that I digitized, or the second zoning district, or the thirds fourth or how many ever I had on that particular page.

Q Now, these names that you talked about, are these names that the City has given to these zoning districts?

A No.

Q Who designated those names?

A I designated these names so I could keep track of what I was doing.

Q You designated them according to the rules you just gave us?

A Yes. I would like to go on and amplify that rule

slightly.

Q Very well.

A Where there was a zoning district that was cut by a church or a school in such a way that it became two zoning districts, it still had the same name. I didn't add a second suffix to say that this is 101.1A and 101.1B. So that you may see in here some repetition of names. This is because of the division of zoning
districts.

Q So, these names that are listed in the first column are ways that you and your computer program kept track of the different districts that you were working with?

A Yes.

Q Now, let's talk about Count 1. What does that represent in terms of the packing model and the protocol that we have discussed in the past few minutes?

A This was what we referred to as Model 1. It was the most densely packed arrangement with the smallest spacing between points representing adult establishments.

Q What does count 1 represent with respect to that sliding protocol that we talked about?

A Here the arrangement of the lattice was such that I got,
as best I could, the maximum number of adult use points in each zoning district that I considered, considering where those zoning districts were located.

Q So, realizing that we are still speaking theoretically

here and realizing that these numbers may all be high in terms of reality, will Count 1 generally be the highest possible count to pack even these theoretical points into a particular area?

A Yes.

Q How does Count 2 differ from Count 1?

A Count 2 used the same lattice. So, we are still packing densely.

Q That is the one we called Model 1?

A That's Model 1.

Q Okay. That is how it is the same. How is it different?

A It differs in that I located points within zoning districts so that the fewest number that met the rules of the lattice could be fit in there.

Q So, that was that second way of sliding the lattice around that I asked you about?

A Correct.

Q Now, still, when you use that, is it still true that you couldn't put another adult use in consistent with the thousand-foot separation requirement?

A That's correct.

Q So, it is still giving us another kind of maximum, is that correct?

A That's correct.

Q Because of the difference in the sliding rule that you use, would you expect, as a theoretical matter, Count 2 to always be lower than Count 1?

A Yes.

Q Let's talk about Count 3. How was Count constructed?

A Count 3 followed all the rules for Count 1 except that the lattice points were more distantly spaced. In no instance were they beyond the thousand feet. That is given. But instead of being at that five hundred foot spacing, these are spread out a little bit so that each place has what you might think of as a somewhat larger trade area or somewhat larger dominating area but still it is just the largest it could be and still at have no other adult uses get into that area.

Q So, is that what you described before, that I designated as Model 2?

A That is correct.

Q Now, again, you said it was similar in all other respects -- that Count 3 was similar in all other respects to Count 1. Does that mean that you adopted a sliding rule that maximized the number of those Model 2 lattice points that you could fit in an area?

A Yes, that is exactly what I did.

Q Finally, Count 4.

A Count 4 is comparable to Count 2. If I could get two points in by locating something on the diagonal of a square, if I located something like staying in the center of the square and only could get one in, then that was the result of Count 4.

Q So, in other words, Count 4 is something very similar, in a theoretical sense, to the example that his Honor put of an area that might be large enough to hold more than one, if they were at the edges, but is small enough so that one in the center could dominate and exclude all others?

A That is exactly right.

Q Now, again, even this Count 4 number, is that the number -- sticking within the realm of theoretical points -- is that the number you would expect to be lowest of all the counts?

A Within the theoretical concepts, yes.

Q Now, even this number, how might that relate to actual adult uses on actual land?

A It's got to be high.